

## ANNEX 5-A

### SUMMARY OF OUTBOUND RESTRAINT CASES

#### U.S. Government Enforcement Against Foreign Export Restraints

The Advisory Committee has examined the record of antitrust cases filed by the United States and identified 44 cases since 1912 in which the United States claimed that defendants were engaged in conduct that restrained U.S. exports abroad.<sup>1</sup> The cases deal with several types of practices, including allegations of anticompetitive conduct that also affects U.S. domestic commerce.<sup>2</sup> Indeed, many of the cases include a combination of U.S. and foreign companies acting in concert to limit competition in a particular industry.

Many of the early cases with export restraint allegations involve international cartels. Two cases from the 1950s established strong precedents for modern-day prosecution of international cartels. In *United States v. Timken Roller Bearing Co.*, the U.S. brought a civil action against a U.S. company (the major producer of tapered roller bearings) alleging that the company and its European affiliates had violated the Sherman Act by allocating geographic territories, fixing prices and restraining U.S. imports and exports. The district court found that these actions violated Sherman Act. The Supreme Court upheld the lower court decision.<sup>3</sup> In *United States v. Minnesota Mining & Mfg. Co.*, the U.S. government challenged an agreement among American manufacturers controlling 80 percent of export trade in coated abrasives; these companies agreed to establish jointly owned factories abroad and to refrain from exporting from the United States to countries where such plants were located. A federal district court held this arrangement to be illegal under the Sherman Act.<sup>4</sup>

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<sup>1</sup> See Antitrust Cases Filed by the U.S. Involving Export Restraint Allegations, Memorandum prepared by ICPAC Staff for the December 16, 1998 Advisory Committee meeting. Document available from Antitrust Public Documents Group, U.S. Department of Justice. This memorandum does not purport to be an exhaustive survey of U.S. antitrust enforcement actions.

<sup>2</sup> See e.g., *United States v. General Electric Co.*, 1962 Trade Cas. (CCH) ¶¶ 70342; 70546 (S.D.N.Y. 1962).

<sup>3</sup> *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Ohio 1949), *modified* 341 U.S. 593, 71 S. Ct. 971 (1951). The Supreme Court, however, reversed the district court's order that the defendant be required to divest itself of all interests in the foreign corporations who participated in the conspiracy.

<sup>4</sup> *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950), *amended*, 96 F. Supp. 356 (D. Mass. 1951). Another well-known enforcement action against a cartel from this period is *United States v. The Watchmakers of Switzerland Information Center*. In this case, the United States alleged a variety of anticompetitive agreements between Swiss and American watch makers. The U.S. alleged that these agreements were intended to prevent new competition in the U.S., fix prices of Swiss watches in the U.S. and to prevent exports of U.S.-produced watches to Switzerland and elsewhere. The court found that both the U.S. and Swiss defendants violated the Sherman Act.

The Advisory Committee was able to find only five cases since 1978 that involved export restraint allegations.<sup>5</sup> In a 1978 case, the United States launched a civil case against Westinghouse Electric Corp. and two Japanese firms, alleging that they had engaged in cross-licensing of patents in order to restrict imports of Mitsubishi products into the United States and imports of Westinghouse and other products into Japan. The complaint was dismissed because the government failed to show that the cross-licensing in this case violated the antitrust laws. In another 1978 case, the U.S. filed an information charge against Gulf Oil, alleging that Gulf had participated in an international cartel that fixed prices on foreign-source uranium shipments to the United States and refused to deal with U.S. uranium “middlemen,” including Westinghouse, which sought to purchase foreign uranium for reexport to its reactor customers overseas. The complaint charged that the effects of Gulf’s conduct were to stabilize prices and allocate uranium sales among the cartel members. The case was terminated with a *nolo contendere* plea and a fine.

In a 1979 case, *United States v. Bechtel*, the United States brought a civil case against Bechtel and three of its affiliated construction firms, alleging that they had violated the Sherman Act by conspiring to refuse to deal with U.S. subcontractors blacklisted by Arab League countries pursuant to the Arab boycott of Israel, and by requiring their subcontractors to do the same. The government said that the conspiracy restrained U.S. export of construction services and equipment by the boycotted firms to those Arab countries. The case was settled by a consent decree prohibiting the defendants from participating in the Arab boycott. In a 1982 case, *United States v. C. Itoh & Co., Ltd.*, the United States brought a civil case against eight Japanese importers of Alaskan seafood products, alleging that the defendants had fixed the prices they paid U.S. seafood processors for exported crab. The case was settled by a consent decree enjoining the defendants from fixing prices and exchanging certain price information.

The fifth case, *United States v. Pilkington PLC*, is the only case involving export restraint allegations since the Justice Department eliminate footnote 159 and clarified that its definition of harm included both consumers and firms.<sup>6</sup> In a 1994 case, the Department of Justice charged the U.K. firm Pilkington with entering into unreasonably restrictive patent and know-how licensing agreements with its likely competitors for the manufacture of flat glass using a proprietary process. The Department alleged that the territorial and use limitations in the agreements precluded Pilkington’s licensees in the United States from competing for business to design, build and operate flat glass plants in other countries. This was not a pure export case because the complaint also alleged that Pilkington’s territorial and use restrictions insulated its U.S.-based licensees from foreign-based competition. The challenged conduct was in fact the arrangement between Pilkington and its U.S. licensees, even though Pilkington no longer had enforceable

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<sup>5</sup> *United States v. Westinghouse Electric Corp.*, 471 F.Supp. 532 (N.D. Cal. 1978), *affirmed in part, reversed in part*, 648 F.2d 642 (9<sup>th</sup> Cir. 1981); *United States v. Gulf Oil Corp.*, [1970-79 Transfer Binder] Trade Reg. Rep. (CCH) ¶45,078, Case No. 2640 (W.D. Pa. 1978); *United States v. Bechtel Corp.*, 1979-1 Trade Cas. (CCH) ¶¶62,649, 62,430 (N.D. Cal. 1979), *affirmed*, 648 F.2d 660 (9<sup>th</sup> Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States v. C. Itoh & Co., Ltd.*, 198203 Trade Cas. (CCH) ¶65,010 (W.D. Wash. 1982); *United States v. Pilkington PLC*, 1994-2 Trade Cas. (CCH) ¶70,842 (D.Ariz. 1994).

<sup>6</sup> There have been investigations initiated by the United States but continued or completed by a foreign jurisdiction’s competition authority. See Discussion of Nielsen and Amadeus cases in Chapter 5.

intellectual property rights to warrant such restrictions.<sup>7</sup> Pilkington signed a consent decree that prohibited the company from enforcing its territorial and use restrictions and also obliged the firm to publicize that its technology was in the public domain.<sup>8</sup>

In two cases in the late 1980s, the threat of Justice Department extraterritorial enforcement appears to have been enough to encourage several Japanese firms charged with bid-rigging at a U.S. military to settle and pay substantial fines. In 1987 the United States discovered that Japanese construction companies were submitting rigged bids to the U.S. Navy for construction projects at its base in Yokosuka. The Navy turned its findings over to the Japan Fair Trade Commission, which fined the construction firms. The United States demanded damages from the Japanese companies and informed those with U.S. subsidiaries that it was contemplating action in the United States against them. Soon after, virtually all of the companies agreed to settle.<sup>9</sup>

A similar story was played out a few years later, when the United States discovered in November 1989 that 12 Japanese telecommunications companies submitted rigged bids on 27 contracts awarded by the Air Force at its Yokota airbase. The findings were again turned over to the JFTC, which imposed fines and issued administrative warnings. The Department of Justice again threatened legal action against the companies and their U.S. subsidiaries. Soon after, the companies agreed to settle.<sup>10</sup>

### **Private Antitrust Litigation Against Foreign Export Restraints**

The Advisory Committee has also considered the extent to which private litigation can serve as a meaningful tool to open markets. Two private antitrust cases reviewed by the Supreme Court have delineated the reach of the antitrust laws against export restraints. In *Continental Ore Co. v. Union Carbide and Carbon Corp.*,<sup>11</sup> the Supreme Court broadly construed the antitrust laws to find liability where producers of mineral ore prevented a U.S. competitor from selling in Canada. In *Continental Ore*, the plaintiff Continental Ore, a buyer and seller of metals, alleged that the defendants monopolized and attempted to monopolize trade and commerce in the metals ferrovanadium and vanadium oxide. As an

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<sup>7</sup> See, e.g., Michael H. Byowitz, *The Unilateral Use of U.S. Antitrust Laws to Achieve Foreign Market Access: A Pragmatic Assessment*, 1997 FORDHAM CORP. L. INST. 21, 30 (B. Hawk, ed. 1993).

<sup>8</sup> 1994-2 Trade Cas. (CCH) at ¶70,842.

<sup>9</sup> U.S. Department of Justice Press Release 89-420, “Justice Dept. Announces Payment in Japanese Bid Rigging Case” (December 19, 1989).

<sup>10</sup> U.S. Department of Justice Press Release #91-178, “NEC Subsidiary will pay U.S. \$34 Million to Settle Bid-Rigging Scheme” (May 9, 1991); “Japanese Communications Contractors Settle U.S. Price Fixing Accusations, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1554, at 269 (Feb. 27, 1992) cited in Marina Lao, *Jurisdictional Reach of the U.S. Antitrust Laws: Yokosuka and Yokota, and “Footnote 159” Scenarios*, 46 RUTGERS L. REV. 821, 849, fn. 142 (1994).

<sup>11</sup> *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).

element of the conspiracy, Continental alleged that a subsidiary of one of the defendants, which had been appointed by the Canadian government as its exclusive wartime agent for the purchase and allocation of vanadium for Canadian industries, had eliminated Continental entirely from the Canadian market and divided Continental's market solely between defendants. The trial court excluded evidence that demonstrated how Continental had been excluded from the Canadian market, arguing that the matter was wholly within the control of the Canadian government. After a verdict was returned for defendants, the Ninth Circuit Court of Appeals affirmed the trial court's decision to exclude the evidence.

The Supreme Court reversed the Ninth Circuit decision and held that Continental's offer of proof was relevant evidence of a Sherman Act violation. "A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries," the Court said.<sup>12</sup> The Court relied on *United States v. Sisal Sales*,<sup>13</sup> a case in which U.S. corporations sought to monopolize the importation and sale of sisal into the United States, a product that was available only from Mexico. The defendants' control of sisal production was aided by discriminatory legislation of Mexico, which established an official agency as the sole buyer of sisal from the producer; one of the defendants was the exclusive selling agent for the governmental authority. In that case the Supreme Court held that "The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of the parties."<sup>14</sup> In a similar vein, the Supreme Court in *Continental Ore* found that the plaintiff's evidence would have shown that the exclusionary conduct in Canada was taken without any indication that the Canadian Government approved or would have approved of efforts to monopolize the sale and production of vanadium. Furthermore, the Court said, nothing indicated that Canadian law compelled discriminatory purchasing.<sup>15</sup> The Court remanded the case to the trial court for jury to determine whether the loss of Continental's Canadian business was a result of the alleged conspirators.

Another notable Supreme Court case that addresses the reach of the U.S. antitrust laws to outbound conduct is *Zenith Radio Corporation v. Hazeltine Research Inc.*<sup>16</sup> Sued for patent infringement by Hazeltine Research Inc. (HRI), Zenith filed a counterclaim alleging that Hazeltine engaged in a conspiracy with foreign patent pools in the Canadian, English and Australian markets to refuse to license to Zenith and others seeking to export American-made radios and televisions into those markets. The district court found for Zenith on the counterclaim and issued an injunction against HRI's participation

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<sup>12</sup> 370 U.S. at 704.

<sup>13</sup> *United States v. Sisal Sales*, 274 U.S. 268 (1927).

<sup>14</sup> 274 U.S. at 276.

<sup>15</sup> 370 U.S. at 706-7.

<sup>16</sup> *Zenith Radio Corporation v. Hazeltine Research Inc.*, 395 U.S. 100, 89 S.Ct. 1562 (1969).

in conspiracies restricting Zenith's trade in foreign markets. The Court of Appeals reversed, finding that the foreign pools had not damaged Zenith within the four year damages limitation period preceding its claim. The Supreme Court reinstated the district court's findings as to the Canadian pool and affirmed the Court of Appeals findings as to the activities of the English and Australian pools.

In a footnote, the Supreme Court accepted the district court's findings that the HRI's conspiracy with the Canadian patent pool to deny patent licenses to companies seeking to export American-made goods to Canada violated the Sherman Act. "Accepting these findings, we have no doubt that the Sherman Act was violated," the Court wrote. "Once Zenith demonstrated that its exports from the United States had been restrained by pool activities, the treble-damage liability of the domestic company participating in the conspiracy was beyond question."<sup>17</sup>

In another leading private antitrust case involving outbound restraints, *Daishowa International v. North Coast Export Co.*,<sup>18</sup> a U.S. association of lumber companies challenged an agreement by Japanese paper manufacturers to depress the prices paid for wood chips and to boycott American producers who refused to comply with the Japanese terms of purchase.<sup>19</sup> Although the Japanese producers claimed that they were acting together to counter the joint selling agreement of the U.S. association, the U.S. district court in northern California held that the complaint stated a cause of action and granted an injunction against the boycott.

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<sup>17</sup> 395 U.S. at 113, fn. 8, citing *Timken Roller Bearing v. U.S.*, 341 U.S. 593, 599 (1951); *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 704 (1963). For examples of private outbound restraint cases where courts did not find subject matter jurisdiction, see e.g., *National Bank of Canada v. Interbank Card Association*, 666 F.2d 6 (2d. Cir. 1981) (Termination of a Canadian bank as a credit card bank in Canada could not be foreseen to have any appreciable anticompetitive effects on U.S. commerce and, thus, jurisdiction did not exist under the Sherman Act); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 870-71 (10<sup>th</sup> Cir. 1981) (U.S. courts had no jurisdiction over suit by Canadian corporation alleging that several Canadian subsidiaries of U.S. potash producers engaged in a concerted refusal to sell Canadian potash for delivery in Canada. The Canadian corporation did not show more than a speculative and insubstantial effect on U.S. commerce and comity concerns outweighed any effect on U.S. commerce.)

<sup>18</sup> 1982-2 Trade Cas. (CCH) ¶ 64,774 (N.D. Cal. 1982).

<sup>19</sup> The association engaged solely in the export of wood chips and qualified for an exemption from the Sherman Act, provided for in the Webb-Pomerene Act.